IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 78 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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RAJPUT MANSING DEVSING

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 78 of 2002

MR SHAKTISINH GOHIL for Petitioner No. 1

MR BD DESAI Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 06/05/2002

ORAL JUDGEMENT

This revision application has been preferred by the ori. accused challenging the judgment and order passed Criminal Appeal No. 23 of 1995 by the ld. Addl. Sessions Judge, Bhavnagar camping at Mahuva, confirming the judgment and order of conviction recorded by the Ld.

J.M.F.C., Talaja in Criminal Case No.290 of 1986 for the offence punishable under sec. 326, 325 and 324 of IPC and under section 135 of the Bombay Police Act on the strength of the complaint filed by the injured Bhupat Gobar, being CR No. I-46 of 1986 on 25.3.1986.

According to the case of the prosecution, the date of incident the people were celebrating festival of Holi in the traditional way and in the evening the village people were performing the puja of Holika. It is the case of the prosecution that during this performance of the puja, the villagers were throwing or putting the coconut into the holi-fire of Holika. The youngsters of the village after sometime taking out those coocked coconut and ultimately the pieces of the coconut were to be distributed to the villagers as "Prasad."

According to the prosecution, the accused inflicted a Axe blow on the hand of the victim Bhupat Gobar and the victim sustained a grievous hurt and one of the finger of his left hand was cut. Undisputedly, many villagers were standign nearby the Holika of that particular area of the village and practically all of them have seen the incident.

After investigation, the police charge-sheeted the accused for the above offence and at the conclusion of the trial ld. JMFC, Talaja convicted the accused vide judgment and order dated 16.3.1995 to undergo a sentence of R/I for two years and to pay the fine of Rs. 15,00/ and in default, to undergo S/I for a further period of three months. It was also ordered that fine if paid, than Rs. 1000/ be paid to the ori. complainant victim Bhupat Gobar.

This judgment and order was challenged before the ld. Addl. Sessions Judge, Mahuva and the ld. Addl. Sessions Judge has dismissed the appeal and confirmed the judgment and order passed by the Ld. J.M.F.C., Talaja vide impugned judgment and order dated 18.1.2000.

This is a case of two concurrent finding of facts. The Apex Court while dealing with the similar situation has observed in the case of Vimalsingh reported in (1998)7 SCC p. 223 and held that re-appreciation of evidence on an assumption that the evidence of a particular witness was wrongly discarded by the trial court is not permissible. As per settled proposition of law, if any misconception or misappreciation of facts o!n the basis of the evidence by the trial court or the appellate court goes to the root of the very controversy

than the High court can interfere with concurrent finding of facts. The settled propostion of law is that when the trial court and the first appellate court if have committed gross error in appreciating the evidence led by the prosecution and if the revisional court feels that the law has not been interpretted correctly in set of facts available on record, than to avoid miscarriage of justice, the revisonal court should interfere with these two concurrent finding also.

I have considered the finding recorded by the ld. JMFC and the Ld. Addl. Sessions Judge while confirming the fin!d!ing recorded by the ld. JMFC. The accused has been held guilty for the offence punishable under sec. 326 of IPC. It would be appropriate to quote the relevant section with a view to appreciate the case of the proseuction and the facts led by way of evidence during the course of trial

Section: 326: "Voluntarily causing grievous hurt by dangerous weapons or means.- Whoever, except in the case provided for the Section 335, voluntarily, causes grievous hurt by means of any i!nstrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire of any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

The accused can be held responsible only if he is found guilty of causing grievous hurt by dangerous weapon voluntarily. Undisputedly, the element of mens ria and in!tentin of causing the grievous hurt must be fount present as and when the injuries is caused or inflicted. The phrase "voluntarily causing grievous hurt" referred in the above section defined in Sec. 322 of the Act. The explanation given in the act leaves no room of ambiguity or confusion in interpretting this phrase and

has rightly argued that the evidence led by the prosecution is not consistant, on the contrary, there are material improvement and contradiction in the evidence of the complainant Bhupat Gobar. His say before the trial court has not been corroborated substantially by the FIR lodged by him and both the courts below have failed in appreciating this crusial and important aspect.

Both the courts below have tried to appreciate the oral evidence of Dilipsinh Mahipatsinh, examined vide Rxh. 19. Ld. Addl. Sessions Judge has also considered the conduct of the witness and has branded him as an independent witness though he is not named in the FIR as eye witness, however, the court has accepted, considering the totality of facts that he was present at the scene of the incident and he has correctly naratted the story of the incident. His evidence is used as sbustantial piece of evidence and also corroborative piece of use so far as the say of the complainant Bhupat Gobar is concerned.

The closed scrutiny of the evidence by this witness, on the contrary, gives impression that on the strength of the evidence of this witness, the finding recorded by the trial court could have been turned town by the first appellat court in view of the above mentioned legal position.

The description of the incident clearly indicates that any process of taking out the coconut from the Holi-fire, first coconut was to be pulled out from the fire at a some distance and, thereafter the hot and burning coconut was given hit either by lathi or axe or by any other such instrument or weapon. Ld. Addl. Sessions Judge has accepted the version of PW-Dilipsinh and other witnesses in favour of the prosecution but the story unfolded by this witness Dilipsinh indicates that the blow of the Axe allegeldy on the hand of the accused was not an intention below at all. It was to be inflicted on the coconut taken out from the holi-fire and unfortunately on that very movement, it seems that the complainant Bhupat Gobar tried to lift that very coconut with hand and his hand ultimatelty sustained injury with that very Axe blow. It would be appropriate to mention the version of this witness as it is in vernacular Gujarati. The witness has said in his examination-in-chief that:

The element of voluntarily causing grievous hurt defined in section 322 is missing in the evidence. When it was not the case of the Bhupat Gobar in his FIR that the blow was intentional than the subsequent version could not have been said to be a version corroborated by FIR as discussed earlier. With this back-ground, the above versionof PW-Dilipsinh ex. 19, goes to the root and merits of the case of the prosecution.

Medical evidence led by the prosecution even if is accepted as it is, it can be said that it gives the details of injury found on the hand of the injured Bhupat. To prove a case under sec. 326, only the nature of the injury is not proved but the intention and the act has to be proved also simultaneously. This aspect has not been at all considered by the ld. Addl. Session judge and, therefore, the grave error has been committed. It would be, therefore, incorrect to say that the evidence of two eye witnesses support the case of the prosecution. The cross examination of this witness has also described the entire incident and the scenario when the alleged incident has occured. More than one person were pulling out the said coconut from the holi-fire and on each event, the people were giving blows or were hitting the coconut taken out from the fire. This witnesses have also named such persons who were pulling out the coconut from the fire. It is rightly submitted by the ld. counsel for the petitioner that the act of lifting the coconut by hand or giving first hit of such coconut taken out from the holi-fire, it can be considered to be a case of either gravery or sharpness, therefore, the youngsters out of lift the coconut or give the first blow on the coconut. Of course, this part is not specifically brought on record by way of cross examination but the description of the incident available on record gives such or similar impression which has been brought to the notice of this Court during the course of oral submissions.

It is also relevant and important to note that this is a case of single blow. So, the injuries found on the body of the injured whether was an accidental or intentional has remained doubtful. Undisputedly, there was no enimical terms between the accused and the injured. No motive is either pleaded or proved. Both the courts below ought to have appreciated the evidence in this back ground. For short, the say of Mr. Gohil is accepted that the courts below have committed grave error in appreciating the evidence especially in reference to above stated provisions of sec. 322 and sec. 326 of IPC.

As interpretted a person is not said voluntarily to cause hurt except when he both causes grievous hurt defined in section 320 of IPC and intends or knows himself to be likely to cause grievous hurt. So, the causing grievous hurt unless proved and acts intentional or with knowledge would not become an act voluntarily causing grievous hurt defined in sec. 322 of IPC which has been made punishable under sec. 326 of IPC. This ratio has been pronounded by the decision reported in AIR 1958 (Patna) p. 452. Of course, the intention or knowledge can be inferred from circumstances such as enimocity between the accused and the injured or sudden quarrel or the selection of weapon with an intention to cause injury etc. In the present case, there is an element of one aspect that the blow given by Axe on the coconut may have lended on the fingers of left hand otherwise such an injury normally would not have caused. Lack of deligence would not give risse to intention or knowledge either.

Therefore, this revision shall have to be allowed and, therefore, the same is allowed. The order of conviction and sentence imposed by the trial court in Criminal Case No. 290 of 1986 and confirmed by the Court of Sessions while dealing with the Criminal Appeal No. 23 of 1995 is hereby quashed and set aside. The accused is acquitted from the charges levelled against him. The fine, if paid, be refunded to the accused. However, the trial court has paid Rs. 1000/ to injured Bhupat Gobar from the amount deposited by way of fine, than the same shall not be recovered and be remained with the Bhupat Gobar and the petitioner shall not be entitled to the said amount.

Rule is made absolute.

(C.K. BUCH, J.)
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